MOTION FILED

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No. 97-1418

In The

Supreme Court of the United States

October Term, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Successor by merger to Bank of America Illinois,

Petitioner,

v.

203 NORTH LASALLE STREET PARTNERSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN COLLEGE OF REAL ESTATE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American College of Real Estate Lawyers ("ACREL") by and through their undersigned attorney hereby respectfully moves this Court for leave to file the attached amicus curiae brief in support of the Petitioner in the above captioned matter (the "Appeal") and respectfully represent as follows:

Consent of Parties

The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

Interest of the Amicus Curiae

I. ACREL is a non-profit corporation organized for the purpose of gathering together lawyers to improve and reform real estate law. ACREL's membership consists of over 800 attorneys from nearly every state and the District of Columbia, all of whom have concentrated their practice in real estate law for a period of ten years or more, and law professors specializing in the field of real estate law. The case at bar involves a single asset debtor owning commercial real estate.

II. ACREL believes that the decision of the Seventh Circuit, if upheld, will have a serious adverse affect on the availability of financing for the acquisition and development of commercial real property in the United States.

III. ACREL therefore has an interest in presenting to the Court the view that in the broad context of public

policy and future economic development and growth, the interpretation of the Bankruptcy Code advanced by the Seventh Circuit is erroneous and certiorari should be granted to review that interpretation.

The Proposed Amicus Curiae Brief

IV. A copy of the proposed amicus curiae brief is submitted herewith. The proposed brief focuses on legal and policy arguments not made in the brief of the Petitioner.

Conclusion

Due to the Amicus' substantial interest in the outcome of the Appeal, due to the Amicus' substantial expertise in the real estate issues involved in the Appeal, and due to the importance of the issues presented, the *Amicus* hereby requests that its motion for leave to file and *amicus curiae* brief in the Appeal be granted.

Dated: Jamaica, New York
March 31, 1998

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the "new value exception" to the "absolute priority rule" survived the codification of a modified absolute priority rule under § 1129(b)(2)(B)(ii) of the Bankruptcy Code, which does not reflect such an exception.

2. Assuming, arguendo, the existence of a "new value exception" as articulated by this Court in *dicta* in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), whether the Seventh Circuit properly applied the exception.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The American College of Real Estate Lawyers ("ACREL") is a nonprofit corporation organized for the purpose of, *inter alia*, gathering together lawyers "to improve and reform real estate law and practice," (ACREL Articles of Incorporation at 2). ACREL's membership consists of over 800 attorneys from nearly every state and the District of Columbia who have concentrated their practice in real estate law for a period of ten years or more, and law school professors specializing in the field of real estate law. In addition, members elected to ACREL must have demonstrated a willingness to devote time to improving real property law through writing, teaching or participation in professional association activities. ACREL's membership represents the entire spectrum of the real estate industry including borrowers, lenders, investors and developers. The case at bar involves a debtor whose single asset is an interest in commercial real estate that has declined in value to a point where the debtor's real estate is worth less than the amount of secured debt on the property. Whether the property securing the debt may be retained by the debtor's partners under a new value plan without paying the debt is an issue of significant concern to the real estate industry.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

This brief supports the petition of the Petitioner in this case. Due to the background of the Amicus, its experience as counsel to lenders and borrowers, and its familiarity with the confusion, costs and consequences to the real estate industry arising from the ambiguities created by the issues before this Court, ACREL is in a unique position to offer its expertise concerning the adverse consequences that would result from the decision below on the availability of financing for the acquisition and development of commercial real property in the United States.

SUMMARY OF ARGUMENT

This brief urges that certiorari be granted for the following reasons:

1. There is no new value exception or corollary to the fair and equitable requirement of the Bankruptcy Code. The new value principle as articulated in *dicta* prior to the adoption of the Bankruptcy Code was rejected by Congress in favor of a more flexible and modified absolute priority rule that obviated the need for a new value principle.

2. The new value exception applied by the Seventh Circuit distorts the new value corollary articulated by this Court in its *Case v. Los Angeles Lumber dicta* and represents a post-Code invention that contravenes the parameters set by Justice Douglas in *Case* and threatens the very existence of the absolute priority rule.

3. The Seventh Circuit's decision undermines the protection for real estate mortgages built into the Bankruptcy Code and threatens to have a severe negative impact on the real estate industry and the availablity of real estate mortgage financing.

ARGUMENT

I. THE SO-CALLED NEW VALUE EXCEPTION OR NEW VALUE COROLLARY WAS NOT INCORPORATED INTO THE BANKRUPTCY CODE.

This brief supports the conclusions and reasoning of the brief of the Petitioner, the dissent of Judge Kanne in the Seventh Circuit's opinion in *In re 203 N. LaSalle St. Partnership*, 126 F.3d 955, 970 (7th Cir. 1997) and the opinion of the Second Circuit in *In re Coltex Loop Central Three Partners, L.P.*, No. 96-5140, slip op. 7-17 (2d Cir. Feb. 19, 1998) that there is no hold-over new value exception or corollary to the absolute priority rule of the Bankruptcy Code.

A. Confirmation of New Value Plans Prior to the Adoption of The Bankruptcy Code Is an Illusion.

The Seventh Circuit stated that "the new value corollary has long been ensconced in our bankruptcy practice," *In re 203 N. LaSalle St. Partnership*, 126 F.3d 955, 965 (7th Cir. 1997), and that it has been "a major source of new funding in reorganizations for the past fifty years."

Id. at 966. From this predicate, the Seventh Circuit concluded that "one would expect that Congress would address deliberately such a significant issue of economic policy if it had determined to abolish it." *Id.* The problem with this conclusion is that its predicate is incorrect.

From the decision of this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), to the adoption of the Bankruptcy Code in 1978, there appears to be no published evidence that any "shareholder was ever able to convince a court that she contributed sufficient value to be able to retain an interest. Indeed, until the Code's adoption in 1978, no reported case seems to have adopted Justice Douglas' *dicta* as its holding." Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 93 (1991); *see also*, John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 Mich. L. Rev. 963, 1016 (1989) where Professor Ayer concludes, "Justice Douglas' supposed 'exception,' . . . is nowhere present as a rule of decision in Chapter X cases. New value under Chapter X, then, is an illusion."

Thus there was no 50 year history of the new value exception being part of bankruptcy "practice." While the new value theory, as expressed in *dicta* by this Court in *Case* was known, that theory never became part of bankruptcy practice until after the adoption of the Bankruptcy Code.

B. Congress Rejected the New Value Exception When Adopting the Bankruptcy Code.

In 1973, the Commission on the Bankruptcy Laws of the United States in its Report, H.R. Doc. No. 93-137,

Parts I & II, 93d Cong. 1st Sess. (1973), concluded that the absolute priority rule had become a "strait jacket" (Part I at 256-57) because, as applied, it did not permit old equity to participate even with the agreement of all classes of creditors. Its solution was to modify the absolute priority rule by permitting juniors to participate on the basis of a contribution "important to the operation of the reorganized debtor . . . under the plan" on a basis reasonably approximating the value of their contribution. H.R. Doc. No. 93-137, Part II, 93d Cong., 1st Sess. (1973) at 242, § 7-303(4). This proposal created a storm of criticism and was rejected by Congress.

In its place, Congress modified the absolute priority rule to limit its application only to dissenting impaired classes of creditors, thus breaking the perceived strait-jacket by freeing classes of creditors to admit junior interests by agreement. If this limited absolute priority had been in effect under the Bankruptcy Act, the *Case* plan would have been confirmed and the issue that gave rise to the creation of the new value corollary would never have arisen. Thus the Bankruptcy Code obviated the need for a new value corollary. The dissent in LaSalle noted, "the pre-Code rationale for the new value exception makes little sense in today's Chapter 11 environment." 126 F.3d at 976.

Indeed Congress considered a provision that would have incorporated new value into the Code (even including, it would seem, alternative forms of contribution, such as were proffered in *Case*), rejected it and enacted a compromise that allowed for participation by agreement. Although those arguing that the new value corollary survived the adoption of the Bankruptcy Code do so on

the basis that "Congress . . . does not write 'on a clean slate.' " *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), the facts would seem to indicate either that there was nothing on Congress's slate when the Bankruptcy Code was being considered or, if the new value principle were on its slate, Congress clearly erased it before it began to write.

The clear language of Bankruptcy Code § 1129(b)(2)(B) prohibits juniors from retaining an interest on account of their junior interest if dissenting creditors are unpaid. Proponents of new value argue that the interest is not being retained "on account of" the junior interest but because the debtor has made a bid in the form of new value. *LaSalle*, 126 F.3d at 964. It stretches credulity to believe that the debtor, in control of all the information about the property and with the exclusive right to present a plan, is not retaining an interest on account of its junior interest. Indeed in *LaSalle* the Bankruptcy Court argued that the new value offered did not represent the intrinsic value of the property but rather was based on the partners' need to retain the property to avoid tax consequences arising out of their prior interest in the property, thus acknowledging that the new value was offered, and the property retained, on account of the prior junior interest. *See In re 203 N. LaSalle St. Partnership*, 190 B.R. 567, 576 (Bankr. N.D.Ill. 1996); and *infra* note 6.

II. THE NEW VALUE EXCEPTION AS ADOPTED BY THE SEVENTH CIRCUIT DISTORTS THE NEW VALUE COROLLARY AS ARTICULATED IN *DICTA* BY THIS COURT AND ABROGATES THE ABSOLUTE PRIORITY REQUIREMENTS OF THE BANKRUPTCY CODE.

A. The Seventh Circuit Ignores the Creditor Protection Prong of this Court's Articulation of the New Value Requirements.

As discussed above, this brief argues that no new value principle survived the adoption of the Bankruptcy Code. Even if this Court should conclude that new value is still viable, certiorari should be granted and the Seventh Circuit should be reversed because the supposed "new value corollary" applied is not the corollary to absolute priority articulated by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

In *Case*, this Court struck down a plan under which old equity[2] attempted to circumvent the requirement that a plan had to be "fair and equitable," which term requires that interests in the debtor be distributed on the basis of "absolute priority." 308 U.S. at 106. The *Case* plan, approved by all classes of creditors, would have allowed old equity to retain an interest in the debtor based on a promised contribution of expertise even though creditors were not fully compensated.[3] In *dicta*, this Court noted

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[2] The term "old equity" as used herein refers to the stockholders, partners or principals of the debtor.

[3] *Case* was decided under § 77B of the Bankruptcy Act of 1898 (48 Stat. 912). Had the Bankruptcy Code been in effect at the time, the *Case* plan would have been confirmed. Under the

that it had previously stated that creditors could be protected "through other arrangements *which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor.*" 308 U.S. at 117 (quoting *Kansas City Terminal Ry Co. v. Central Union Trust Co.*, 271 U.S. 445, 454 (1926)) (emphasis added). Justice Douglas stated that where the *necessity* for funds exists and old equity makes a fresh contribution "and receive[s] in return a participation *reasonably equivalent* to their contribution," the creditors cannot object on the ground that they were not accorded their "full right of priority against the corporate assets." *Id.*

The *dicta* in *Case* permitted old equity to obtain an interest in the debtor *only if* creditors were accorded their "full right of priority" against the debtor's assets. Old equity could not participate "at the expense of the prior rights . . . of creditors." 308 U.S. at 116. It is this creditor protection prong of the *Case dicta* that the Seventh Circuit and cases adhering to its view, ignore. In *LaSalle*, old equity was allowed to retain valuable property at the expense of the unpaid mortgagee, which received only 16% on its deficiency claim. This would hardly seem to accord the creditor its "full right of priority."[4]

Bankruptcy Code, the fair and equitable requirement applies only to dissenting impaired classes of creditors. Thus there was no longer a need for a "new value corollary" to permit uncompensated seniors to admit juniors, which was the issue in *Case*.

[4] How the standards of the *Case* dicta can be achieved has been the source of much controversy. This difficulty may be the basis for the apparent lack of any reported cases under which a court confirmed a new value plan over the objection of a

Thus, by not affording the creditor its full right of priority, the *LaSalle* debtor's plan did not meet the requirements of the new value corollary to the absolute priority rule, was not fair and equitable, and should not have been confirmed over the objection of an impaired class of creditors. Although the Seventh Circuit refers to new value as a "corollary" to the absolute priority rule, its decision converts the *Case* corollary to a wide exception to the rule that threatens to consume the rule itself. We respectfully urge that certiorari be granted to resolve the extent of protection afforded by the absolute priority rule of the Bankruptcy Code under a new value plan.

B. The Seventh Circuit Distorts the Prerequisites to New Value Articulated by this Court in *Case*.

Under the *dicta* in *Case*, a plan in which old equity retains an interest might be confirmed upon a contribution of new value in the form of money or money's worth *only if* the full priority rights of creditors are preserved; *if* the new value is necessary or " *'essential to the success of the undertaking,'* " 308 U.S. at 121 (quoting *Kansas City Terminal Ry.*, 271 U.S. at 454) (emphasis added); *and if* the retained interest is *reasonably equivalent* to old equity's contribution.[5]

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creditor prior to the adoption of the Bankruptcy Code. This difficulty may also explain the abrogation by some courts (presumably unwittingly) of the creditor protection prong of this Court's articulation of the new value principle.

[5] The courts have engrafted to the *Case* requirements, a further prerequisite of substantiality as either a corollary to the requirement of necessity (*In re Snyder*, 967 F.2d 1126, 1131 (7th

In *LaSalle*, the requirements of necessity and reasonable equivalence have been so ignored and distorted that in reality they no longer are prerequisites to confirmation of a new value plan.

(1) *Necessity*. When Justice Douglas referred to the "necessity, at times, of seeking new money 'essential to the success of the undertaking,' " *id.*, he obviously was referring to the necessity for funds to continue the operation of the enterprise, the production of its product, the provision of its services, and the employment of its workers. In single asset real estate cases, it is normally difficult to find this necessity. There is no business to be continued, no product to be produced, and no service to be performed that will not be continued, produced or performed by the new owner of the real estate.

Cir. 1992)) or as a substitute for all other factors. The substitute theory can be seen in the bankruptcy court decision in *LaSalle*, where the court sees an implication in *In re Woodbrook Associates*, 19 F.3d 312, 320 (7th Cir. 1994) that "substantiality serves as something of a summary of the other factors" (*In re 203 N. LaSalle Street Ltd. Partnership*, 190 B.R. 567, 586 (Bankr. N.D. Ill. 1995)). All courts seem to agree that there is no mathematical formula for determination of substantiality and that the determination should be based on "common sense." This was the view of the Seventh Circuit in *LaSalle*. 126 F.3d at 967. While the addition of another prerequisite on its face causes no harm, given the enormous flexibility that some courts have allowed themselves in determining whether this requirement has been met, and their apparent conclusion that if this requirement is met there is no need to consider the other prerequisites, it appears that "substantiality" is but another shorthanded way to circumvent this Court's stated conditions for confirmation of new value plans.

Confronted with the fact that funds were not essential to the success of the undertaking in *LaSalle*, the Seventh Circuit distorted the necessity requirement to mean essential for confirmation of the debtor's "plan" ("The infusion of new capital was necessary for the successful implementation of the plan." 126 F.3d at 967). Since new value is always proposed by the debtor to enable old equity to keep the property, this switch in the meaning of "necessary" would result in virtually every new value plan meeting this requirement over dissenting unpaid creditors' objection. The approach taken by the Seventh Circuit effectively reads necessity out of the prerequisites for new value plan confirmation. We urge that certiorari be granted to resolve the meaning of "necessary" or "essential."

2. *Reasonable Equivalence*. Under this prerequisite, old equity may not receive more than the reasonable equivalence of its contribution. In single asset cases, the debtor usually has no equity in the property (the property value is lower than the mortgages encumbering it, as was the case in *LaSalle*). In the past, debtors have argued that retention of the property by old equity does not deprive the creditor of its "full right of priority" because what the debtor proposes to retain is worthless. This Court has clearly rejected this "no-value" argument. In *Northern Pacific Ry. v. Boyd*, 228 U.S. 482, 508 (1913), this Court stated that "control" itself was an asset that constituted value and that such value belonged to the creditors, not old equity. This Court again in 1988 reaffirmed that determination in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), stating that "we join in the consensus of

authority which has rejected this 'no value' theory." *Id.* at 207-08.

Notwithstanding these decisions, the *LaSalle* court employed the no-value theory as the basis for determining whether the contribution met the reasonable equivalence standard. The Bankruptcy Court stated that "the contribution is easily the equivalent of the interests retained by the debtor's partners. Indeed, on the market, those interests are worthless." 190 B.R. at 588. The Seventh Circuit acknowledged that the Bankruptcy Court had determined that the contribution was "reasonably equivalent to the interest retained" but failed to discuss whether the requirement had been met, apparently agreeing with the Bankruptcy Court's determination. 126 F.3d at 967.

While legislative suggestions have been made for dealing with new value, none appear to have addressed solutions to the fundamental issues involving compliance with the holdings of this Court discussed in this part of the brief. It is respectfully urged that if we are to remain subject to the rule of law, certiorari should be granted to undo what appears to be an obvious attempt to evade decisions of this Court.

III. THE APPLICATION OF THE SEVENTH CIRCUIT'S VISION OF NEW VALUE TO SINGLE ASSET REAL ESTATE REORGANIZATIONS WOULD SERVE NO PUBLIC PURPOSE, ABROGATE THE PROTECTION FOR MORTGAGEES BUILT INTO THE BANKRUPTCY CODE, AND HAVE A SEVERE AND NEGATIVE IMPACT ON BORROWERS, LENDERS, AND THE REAL ESTATE INDUSTRY.

A. No Public Purpose.

The confirmation of new value plans is often urged as a matter of public policy on the ground that the funds are needed to keep the debtor in business, preserve the going concern value, keep people employed, and preserve the performance or production of needed services or products. Whether or not such arguments make sense in the case of a manufacturer or service provider, these laudable objectives are wholly inapplicable to single asset real estate cases. In the single asset real estate transaction the operation of the real estate will continue no matter who is the owner of the property. It is a non-sequitur to say that the "reorganization will fail" if there is no infusion of new value. The only thing that may fail is the attempt by old equity to keep the debtor's property without paying its just debts.

If the debtor's plan cannot be confirmed and the property goes to foreclosure, the mortgagee or other purchaser at the sale will operate the property. The question is not whether the business will continue. The question is only who will own the property – the debtor's old equity who have not paid the debtor's obligations to creditors, or the creditors who have not been paid. The decision

below opts for the former with old equity given the property and 84% of the creditors deficiency claim wiped out. No public purpose can be served by such a result.

B. Abrogation of Mortgagee Protection.

Section 1129(b)(2)(B) of the Bankruptcy Code prohibits confirmation of a plan over the objection of an impaired class of unsecured creditors if old equity is permitted to retain an interest in the property on account of its junior interest. A major reason for this provision was to overcome the so-called *Pine Gate* line of cases that treated nonrecourse mortgagees as the Seventh Circuit now treats all mortgagees. In *In re Pine Gate Associates, Ltd.*, 2 Bankr. Ct. Dec. (CRR) 1478 (Bankr. N.D. Ga. 1976), and its progeny, decided under chapter XII of the former Bankruptcy Act, the bankruptcy courts allowed debtors to retain the mortgaged property upon payment to the non-recourse mortgagee of the depressed (due to the mid-70's recession) value of the collateral. In direct response to the perceived inequity of the *Pine Gate* line of cases, Congress was asked to restore absolute priority to real estate arrangements under the new chapter 11 of the Bankruptcy Code. *See, e.g.*, Hearings on S.2266 and H.R. 8200 before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 853, 855-56, 864-76 (1977) (statement of John J. Creedon, American Council of Life Insurance).

Congress enacted a package of protection insuring that the mortgagee may have an unsecured claim for the deficiency and providing absolute priority for each dissenting impaired class of creditors, including the

unsecured class. It was this absolute priority for the unsecured class, including the mortgagee's deficiency claim, that provided the protection afforded by Congress. If the unsecured class rejected the plan (and normally in single asset cases the mortgagee's deficiency claim is the only major unsecured claim) the debtor would not be able to retain the property without paying the creditors. The plan could not be confirmed.

New value as applied in *LaSalle* and many post enactment Bankruptcy Code cases would abrogate this protection by restoring the *Pine Gate* rule – in a much more sinister form. In both situations the debtor would keep the property. The difference is that in *Pine Gate*, the mortgagee would receive an immediate payment of cash equal to the court determined value of the collateral whereas in the new value cases after the enactment of the Bankruptcy Code, the mortgagee would receive only a mortgage with a face amount equal to the court determined value of the collateral. This retention of the property by old equity when portions of, or all of the mortgagee's deficiency claim is wiped out is clearly the opposite of what Congress intended. *See* S. Rep. No. 95-598, at 65 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5851 (stating that a precursor of present § 1111(b), which affords a deficiency claim to nonrecourse mortgagees, "answers the nonrecourse loan problem and gives the creditor an unsecured claim for the difference between the value of the collateral and the debt in response to the decision in" *Pine Gate*); *see also In re DRW Property Co. 82*, 57 B.R. 987, 990 (Bankr. N.D. Tex. 1986) (stating Congress enacted section 1111(b) "to alleviate the *Pine Gate* problem and to attempt to restore the benefit of the bargain to nonrecourse secured creditors").

Indeed the statutory language prevents the debtor in single asset cases from ever retaining the property when the mortgagee's deficiency claim is unpaid. Section 506(a) provides that a claim is secured only to the extent of the value of the collateral. Section 1129(b)(2) requires that the secured claim be equal in amount and value to the collateral value as of the effective date of the plan. Any new value offered represents a bid by old equity for the single property in an amount in excess of the amount of the mortgage. Such a bid represents the value of the property and, under § 1129(b)(2), requires that the secured claim be increased to that value. As a result no plan under which the property will be acquired for less than the full amount of the mortgage balance before bifurcation into secured and unsecured portions can be confirmed over the objection of the secured creditor class.[6]

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[6] In *LaSalle*, the Bankruptcy Court attempted to deflect this argument by finding that the bid was not based on the "intrinsic" value of the real estate "but because of the tax consequences that flow from their loss." 190 B.R. at 588. However the price paid for property is normally considered determinative of value without an examination of the motivations of the purchaser. "[I]f the collateral is actually sold during the course of the bankruptcy proceedings or pursuant to a confirmed plan, the consideration received from the sale will almost always resolve the question of value." 5 COLLIER ON BANKRUPTCY ¶ 506.03[4][a] at n.58 (Lawrence P. King et al. eds. 15th ed. rev. 1997). Indeed, in *LaSalle* the bankruptcy court itself, in referring to what would be paid on the deficiency claim, stated that the creditor will receive "50% of the net *value* of the property either as *realized in a sale*, or as appraised at the time of any refinancing." (emphasis added). The price paid indicates value. The motivation of the purchaser is irrelevant.

It should be apparent that new value as interpreted by the Seventh Circuit would undo the absolute priority protection afforded by Congress to mortgagees. This would represent a major change in the treatment of creditors in bankruptcy. We respectfully request that certiorari be granted to resolve this issue.

C. Negative Impact on the Real Estate Industry.

The decision below will have a severe adverse impact on the real estate industry. Literally billions of dollars have been loaned to real estate developers by institutions, including insurance companies and pension plans that insure and protect millions of ordinary citizens, on the strength of real property collateral and the protection for realization on that collateral built into the Bankruptcy Code.

The decision below will result in the reduction of the availabilty of funds for real estate development, as lenders, faced with the uncertainties of the decision below, channel funds away from real estate investments to other forms of lending. For those funds that are available for real estate investment, the decision below will result in tighter credit standards and higher interest rates to reflect the greater risk involved. The failure to resolve the issues raised by *LaSalle* will mean the continuation of the present uncertainty and extensive future litigation in real estate bankruptcies. Thus *LaSalle* not only threatens existing mortgage debt held by lenders, but also threatens the future of the real estate industry, which relies so heavily on mortgage financing.

The Bankruptcy Code was carefully drafted by Congress to balance the interests of debtors and creditors and provide for the efficient administration of bankruptcy cases in the United States. If Courts are permitted by judicial legislation to undermine the foundations of the protection afforded to real estate mortgagees, the real estate industry and the national economy will be severely and adversely affected.

CONCLUSION

For all the reasons set forth herein, the American College of Real Estate Lawyers respectfully urges this Court to grant certiorari.

Respectfully submitted,

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